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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 209

EMICH MOTORS CORPORATION AND U. S. ACCEPTANCE CORPORATION,

Petitioners,

vs.

GENERAL MOTORS CORPORATION AND GENERAL MOTORS ACCEPTANCE CORPORATION,

Respondents.

REPLY BRIEF OF PETITIONERS TO BRIEF OF RESPONDENTS IN OPPOSITION TO PETITION FOR CERTIORARI.

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Correction of Citations in the Petition for Certiorari.

In the Table of Cases and at page 16 of the Petition for Certiorari, the following cases were miscited. The correct citations are as follows:

Young v. *Black*, 7 Cranch (11 U. S.), 565, 567.

Hopkins v. *Lee*, 6 Wheat (19 U. S.), 109, 116, 117.

Also, at page 40 of the Petition for Certiorari, the record reference given as "R. 9450" should be "R. 9540".

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Facts and Issues.

In keeping with the limited function of the petition for certiorari, petitioners confined the Questions Presented to those of great public importance. All others were reserved for the brief on the merits, and to the extent that they are raised by respondents' brief, will be deferred.

The brief in opposition is concerned primarily with whether the holdings were erroneous. Little effort—in some cases, no effort—is made to demonstrate that the

questions are not properly presented or lack public importance.

To petitioners, the most remarkable feature of the opposing brief is that respondents stand virtually mute in this high Court in the face of an unparalleled array of charges, each shown out of the record, and in their totality amounting to a demonstration of a wilful obstruction of justice. It is fair to say that no innocent reputable business organization would fail to make an all-out attempt to refute the demonstration that the defense was "compounded of a dishonest reversal in strategy, denials mass-produced and carried to ludicrous extremes, the destruction and doctoring of documents, the suppression of vital evidence, the tampering with witnesses and the like" (Petn., pp. 33-38). And for respondents to urge the non-sequitur that because they were not cited for contempt, it follows that they are not guilty (Resp. Bf., p. 24), is to add to the injury by insulting the intelligence.

The keynote of evasion and distortion which permeates respondents' entire brief is found in the opening contention that "the basic question is whether the recovery of money in this private suit under the Clayton Act should stand or a new trial should be ordered" (Resp. Bf., p. 2) —in short, that the issue is whether the money judgment should be affirmed or the case retried. From this truism, respondents move to the elementary fallacy that because the holdings on substantive law were developed in connection with rulings on evidence and instructions, the case presents only "procedural matters" and not questions of substantive law (Resp. Bf., p. 4). Respondents wed this fallacy to the absurd proposition that it "cannot fairly be anticipated" that the opinion below "may in the future be misconstrued and misapplied in this or in other proceedings" (Resp. Bf., p. 4). Manifestly, the importance of the opinion below does not lie in the possibility that it

may be "misconstrued and misapplied" but rather in the serious consequences of a correct construction and application. But apart from this, respondents' concession that the opinion will affect "the conduct of jury trials" (Resp. Bf., p. 4) alone suffices to show the irrationality of their simultaneous contention that the opinion will have no impact on future cases.

To expose every evasion and distortion in the opposing brief would consume more space than is now warranted. Only a few will be dealt with.

One is respondents' attempt to slough off the price-fixing purpose of the conspiracy (Resp. Bf., p. 18). Petitioners justified the exclusion of evidence of so-called comparative finance charges[1] on the ground that it was directed

1. Respondents arbitrarily attached the label of fraud to the evidence of so-called comparative finance charges in order to obscure its true nature. The trial court penetrated this device. It let in all evidence of alleged misrepresentations (the indispensable ingredient of fraud) and petitioners made no objections thereto (R. 4776, 4939, 5317, 6456, 6458, 6716, Appendix to Petn., p. x). The trial court, while admitting a substantial amount of evidence of comparative finance charges (Appendix to Petn., pp. xi-xii), excluded the offers cited (Resp. Bf., pp. 9-11) because, as will be seen, they had no bearing on fraud. The propriety of the grounds assigned for the exclusion of such evidence (R. 2936, 2940, 3401) has in no way been refuted.

The two principal items cited, defendants' exhibit 173 for identification and related offers (misdescribed as "extracts from Emich's own records", Resp. Bf., top of p. 9), and the Stapleton offer (Resp. Bf., p. 9), were the spurious challenged offers of matters not claimed to have been known, and therefore immaterial as to the main issue of frame of mind (Petn., pp. 32, 38-41). From the words of these offers, it may be seen that neither was designed to show any actual misrepresentation to a customer. The 141 selected installment transactions embraced by Exhibit 173 purport to show merely that the price differential therein was higher than under the 6% plan originated by GMAC. The fabricated Stapleton offer, relating to a period ending with 1934 (R. 5041), over 1¼ years prior to the cancellations, obscures the vital fact that rate charts were not exhibited to customers nor were they told how charges were computed (see respondents' concession, R. 3124), in view of which the customer could not be deceived concerning the particulars of the rate chart or the way in which the charges were arrived at. Similarly, Hobday's letter (Resp. Bf., p. 10) did not claim any misrepresentations, only that under the National Bond and Investment Co. plan in 1933 (R. 4942—Emich Finance not involved) he paid more than others charged (Hobday testified to the pertinent facts of the transaction referred to in the letter, R. 4936-4937). Likewise, Brellenthin's offer (Resp. Bf., p. 10) was to show instances where the dealer allegedly made charges exceeding GMAC's, thus amounting merely to a comparison with GMAC's rates without any offer to show misrepresentations (Brellenthin, too, testified to the very same subject matter and to the same effect as the matter excluded, R. 5331).

to the illegal defense of price-fixing (Petn., pp. 26-29). Respondents do not dispute the basic legal proposition that if the evidence in question would have established a price-fixing purpose, it was properly excluded;[1] but they make a general denial that the evidence would establish such a purpose (Resp. Bf., p. 18). This denial, however, is empty, inasmuch as they leave unchallenged the particulars of the evidence (Petn., pp. 26-28) which show indisputably that they fixed the dealers' resale prices by contract provisions and control of advertising. But worse, in making this denial, they flatly contradict *their own* incontrovertible evidence of price-fixing. Their witness McInerney testified as to how the Chicago Dealers' Association and Chevrolet fixed the price of cars equipped and delivered in the Chicago area:

> "A Chevrolet representative was present * * * We incorporated the additional price of the accessories into the list price of the car as furnished by Chevrolet Motor Company, and established that as our delivered price in Chicago (R. 4397) * * * In other words, the factory advertised a certain list price and we (the Association committee) got together with our (factory) representative here in Chicago * * * and added the price of the (accessories) group" (R. 4400).

This was in line with the function of the Association, as stated by another of their witnesses, *i.e.*, "standardizing practices between the dealers and the corporation" (R. 4210).

Dispelling any doubts that Chicago prices were so established, respondents introduced the price lists for 1934 to 1936 (R. 8823-8825). Respondents' counsel forthrightly described these lists (R. 6903): "They constitute price lists

1. This proposition is beyond dispute, inasmuch as the dealer is an independent businessman, not an agent (R. 47-48); the cars he sells are his own and the retail purchasers are his, not the manufacturer's (R. 732-737; 121 F. (2d), at pp. 399-400). From this, it follows that the manufacturer and the discount company may not join forces to fix his installment prices (Petn., pp. 26-29).

for 1934, 1935 and 1936, for cars equipped and delivered in the Chicago area."

In denying the price-fixing purpose while at the same time insisting that the evidence of so-called comparative finance charges should have been admitted (Resp. Bf., pp. 6-11), respondents contradict the very reason repeatedly asserted by them as GMAC's reason for existence, *i.e.*, to fix the "overall cost" of a car sold on the installment plan.[1]

To evade petitioners' argument that compelling dealers to adhere to GMAC's price differential was merely respondents' method of fixing the dealers' installment resale prices, respondents retreat to the argumentative position that they used force against the dealer merely with the "good motive" of preventing "fleecing" and to protect their "good will." To support this, they say they never made an issue of the dealer's delivered prices (Resp. Bf., p. 18), in line with their belated concession below *that they never expected nor attempted to prove that Emich Motors' delivered prices were higher than or even as high as those of dealers using the GMAC plan* (R. 9540; Petn., p. 40). This imparts to the word "fleecing" a meaning that is absurd. It makes the criterion of fleecing, not the price itself, but rather how the price is arrived at and how the proceeds of the installment sale are apportioned as between the dealer and the discount company—a bookkeeping

1. "* * * it (GMAC) assured him (the consumer) the opportunity of purchasing his G. M. automobile on a time basis at the lowest *overall cost*." Page 43 of Reply Bf. of General Motors Corp. *et al.* in "*U. S.* v. *General Motors Corp., et al.*", CA 7, Oct. Tm., 1940, Cause No. 7146, reported as 121 F. (2d) 376.

To the same effect, see Chev. manual under caption: "Importance of Low Time as Well as Low Cash Delivered Prices of New Cars" (R. 7727); also, testimony of John J. Raskob (R. 1075, sentences beginning "The whole scheme, etc." and "In line with that policy, etc."); also respondents' argument as to the intended evidentiary effect of evidence of other dealers' finance charges, *i. e.*, use of GMAC's terms would not "add to the *total cost* of the new Chevrolet car" (R. 4645). Cf. respondents' requested charge in the criminal case that "defendants had a legitimate object in protecting the public against *overcharges and unduly high prices* for General Motors cars" (Crim. Rec., p. 2186).

transaction insofar as petitioners were concerned, and obviously a matter of supreme indifference to the customer.

Patently, this peculiar definition was designed to obscure the price-fixing motive. If respondents regard one higher component as fleecing, it stands to reason that they would regard every higher component as fleecing, from which it follows that a higher total price for the car, consisting of all the components, would also be regarded as fleecing.

Thus, logic as well as the evidence (Petn., pp. 26-28) bear out petitioners' contention that the defense of "good motive" was merely a disguise for an illegal price-fixing purpose and therefore that the evidence offered to support this defense was properly excluded. Cf. *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 220-222; *U. S.* v. *Univis Lens Co.*, 316 U. S. 241, 254; *Fashion Originators' Guild* v. *F.T.C.*, 312 U. S. 457, 467-468.

Respondents create the misimpression that petitioners, through cited testimony of Fred Emich, created an issue as to whether Emich Motors was a perfect dealer, without defects or customer complaints. Certain excluded evidence is claimed to be admissible on that issue, in rebuttal of said testimony (Resp. Bf., pp. 8, 12).

The short answer is that petitioners never created such an issue. Fred Emich never so testified.[1] Petitioners never

1. *Comparative Finance Charges*—Respondents misstate Emich's testimony (Resp. Bf., p. 8). Contrary to the impression conveyed that he was testifying as to certain independent facts, the record citations show that he was testifying only as to conversations. At R. 1159, he was testifying on direct examination, and at R. 1357, on cross-examination, as to his conversation with the Chevrolet officials in April, 1936. At R. 1344-1345, he was being cross-examined as to whether Hill's letters (Plfs. Exs. 358 and 359, R. 8337, 8338) accurately represented conversations which they purported to confirm. Respondents rebutted these conversations by the testimony of each of the other participants therein (conversation of 7/5/35—R. 6090, 6098-6099; conversation of April, 1936—*Hill*, R. 6121-6128; *Smith*, R. 6466-6468; *Doran*, R. 6565-6567; *Holler*, R. 6759-6760).

Matters of Repair Service—Respondents again misstate Emich's testimony (Resp. Bf., p. 12). As above, the record citations show he was not testifying to independent facts but only as to the said conversation of April, 1936. Respondents rebutted by the testimony of the other participants (Record citations as given above).

claimed that Emich Motors was other than an average dealer with average defects and complaints (R. 7155). The crucial issue was whether the reasons set forth in the doctored cancellation forms were the real reasons or merely "good" reasons masking the conspiratorial purpose (R. 9459; Resp. Bf., p. 7).[1]

Respondents attempted to refute petitioners' strong showing of delivery discriminations (Petn., pp. 34-35, Appendix to Petn., pp. vi-vii) by referring to respondents' analysis of Emich Motors' records showing a small monthly car inventory balance and temporary loans of a few cars to other dealers (Resp. Bf., p. 7, fn). This analysis was misleading because, as respondents' expert admitted, it dealt with cars merely as units (R. 3974). But Emich Motors had orders for cars, not in general, but of specific models, body styles and colors (e.g., descriptions at R. 8353-8356). Thus, the analysis fails to support respondents' position—indeed, in the face of the Feehan letters, confirms that Emich Motors, while not receiving cars for

1. There never was any question that Emich Motors like others had service complaints. But petitioners contended that Chevrolet knew that the complaints brought to their attention were usually due to defects in the manufacture of the car, special conditions or unreasonable demands of the owners. Defendants introduced a large volume of evidence, both testimonial and documentary, as to complaints brought to their attention (Appendix to Petn., pp. ix-x). Plaintiffs showed the trivial or unreasonable nature of many of these through Chevrolet's documents and cross-examination. Illustrations: Battery expired after 17 months of once-a-week driving (R. 5429, 5430, 8941). Free service refused after guarantee period expired (R. 5297-5303, 8937). Complaint of excessive oil consumption held unwarranted by Chevrolet itself (R. 8503, 8929, 8479). As bearing on the issue of whether such complaints were the motivating reason for the cancellation, the evidence showed Chevrolet wrote of customer *praise* for good service (R. 8483, 8529), told on their investigation forms of good service to owner (R. 8507), and advised complaining customers: "The Emich Motors Corporation are willing at all times to stand behind their transactions" (R. 8524), and even *after the cancellation*, "We have always found Emich Chevrolet to be honorable in their dealings with customers, and I feel sure Mr. Emich is willing to meet all legitimate complaints in a businesslike manner" (R. 8520).

That Emich Motors' defects were not the real reason for the cancellation is strikingly illustrated by the fact that nevertheless Emich was given a Pontiac (General Motors) franchise shortly after the Chevrolet franchise was cancelled (R. 1467, 1469).

which it had orders, was getting cars of wrong model, body style and color for which it had no orders—a double-barreled discrimination (R. 1129, 1125).[1]

1. The opposing brief creates the misimpression that Fred Emich once testified that he received enough cars in "all years including 1936" (Resp. Bf., p. 7, fn.). R. 6965 shows he was referring only to the few months in 1936 before the effective date of the cancellation. The discrimination was then alleviated, apparently because Hill wished to forestall criticism during Emich Motors' last days (R. 8914).

ARGUMENT.

I.

Section 5 of the Clayton Act.

Respondents' major contentions are (A) there is no serious question of statutory construction in this case (Resp. Bf., p. 13), (B) the Court of Appeals' construction of Section 5 is of no public importance because it would not apply to other cases, this case being "unique", and (C) certain of petitioners' contentions are without merit (Resp. Bf., pp. 13, 17).

(A) The Construction Question.

Respondents say the case "did not turn upon a construction of Section 5" (Resp. Bf., caption, p. 13). This is untenable. The indictment and criminal judgment were admitted only by virtue of the statute, and the propriety of the instructions concerning them was judged on the basis of what the statute permits.

Petitioners showed that Section 5 is not to be construed as incorporating by reference the doctrine of estoppel by judgment, and certainly not the limitations applied in conventional cases where the doctrine is employed as an absolute bar of the defense (Petn., pp. 21-23). Respondents do not address themselves to any of the arguments supporting this contention, begging the question on the basis of a supposed concession by petitioners' counsel in the trial court "That Section 5 * * * incorporated the doctrine of estoppel by judgment" (Resp. Bf., p. 14). The fact is that no such concession was made,[1] but even if made, petitioners would not be limited thereby in supporting the judgment. *Helvering* v. *Gowran*, 302 U. S. 238, 245-246.

1. See *post*, p. 12, fn. 2.

(B) Public Importance.

Form of Indictment. Respondents say the construction below is inapplicable to other cases, and therefore without public importance, because the General Motors indictment was "unique" in vital respects (Resp. Bf., pp. 15-17; see especially p. 17, fn. 2).

There is neither truth nor merit in this contention. The General Motors indictment followed a conventional pattern in large conspiracy cases. It charged the crime in general language in the initial charging paragraph 34 (i. e., the so-called "accusatory paragraph", R. 335), and the object and means in paragraphs 35 to 62 (R. 335-339).

The same segregation of subject matter by paragraphs is found in the anti-trust indictments in the *A. and P.* case, the *Local 807 Teamsters'* case, the poultry union criminal case involved in *Local 167* v. *U. S.*, 291 U. S. 293, hereinafter discussed, and other typical cases, past and pending.[1]

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1. *U. S.* v. *N. Y. Gt. Atl. & Pac. Tea Co., Inc.*, (U. S. D. C., E. D. Ill.), Docket No. 16153 (Crim.), reported as 67 F. Supp. 626, aff'd. 173 F. (2d) 79. Initial charging paragraph 24 does not state the object of the conspiracy nor the means. Par. 25, in numerous subparagraphs, described several objects and specified many means.

U. S. v. Local 807, I. B. T., 315 U. S. 521 (Oct. Term, 1941, No. 131), Transcript of Rec., Vol. 1, pp. 46-49, 51-53); par. XV sets forth the conspiracy in general terms; par. XVI sets forth the objects of the conspiracy; par. XIX sets forth the means in 13 lettered sub-paragraphs.

Other cases in the past:

U. S. v. *The Central Supply Ass'n, et al.* (U. S. D. C., N. D., Ohio, E. D., No. 16750, reported at 40 F. Supp. 964); *U. S.* v. *Bausch & Lomb Optical Co., et al.* (U. S. D. C., S. D., N. Y., No. 107-169, reported at 34 F. Supp. 267); *U. S. v. St. Louis Tile Contractors' Ass'n, et al.* (U. S. D. C., E. D., Mo., E. D., No. 21552); *U. S.* v. *Aluminum Co. of America, et al.* (U. S. D. C., S. D., N. Y., No. 109-189, reported at 41 F. Supp. 347).

Other cases now pending:

U. S. v. *Stern, et al.* (U. S. D. C., E. D., Pa., Cr. No. 15466); *U. S.* v. *The Jamison Cold Storage Door Company, et al.* (U. S. D. C., N. D., Ohio, E. D., Cr. No. 19875); *U. S.* v. *The Association of American Battery Manufacturers, et al.* (U. S. D. C., W. D., Mo., W. D., Cr. No. 17652); *U. S.* v. *New Orleans Ice Delivery Corporation, et al.* (U. S. D. C., E. D., La., New Orleans Div., Cr. No. 23641); *U. S.* v. *Krasnov, et al.* (U. S. D. C., E. D., Pa., Cr. No. 15754); *U. S.* v. *The West Texas-New Mexico Chapter, etc., et al.* (U. S. D. C., W. D., Tex., El Paso Div., Cr. No. 45,500); *U. S.* v. *Northern California Joint Council, etc., et al.* (U. S. D. C., N. D., Cal., S. D., Cr. No. 32665); *U. S.* v. *L. A. Young Spring and Wire Corp., et al.* (U. S. D. C., E. D., Mich., S. D., Cr. No. 31756); *U. S.* v. *Servel, Inc., et al.* (U. S. D. C., W. D., Pa., Cr. No. 13206).

Respondents represent that there were "basic differences" between the indictments in the *Local 167* case and this case: "In the *Local 167* case the terms of the conspiracy were alleged in the accusatory paragraph. Subsequent paragraphs alleged 'means and methods'" (Resp. Bf., p. 17, fn. 1). This representation is untrue. The indictment in the *Local 167* case (this Court, Oct. Tm., 1930, No. 758) did not set forth all the terms in the so-called accusatory paragraph.[1]

Respondents' contention is also frivolous: *First*, because of the well-established rule that all paragraphs of an indictment are to be read together, *U. S.* v. *Armour & Co.* (C. A. 10), 137 F. (2d) 269, 270, and cases cited therein; *Second*, because even if all terms were located in the accusatory paragraph, respondents' question would remain whether Section 5 would make the criminal judgment evidence of the terms.

Form of Criminal Case Instructions. Respondents say the construction below is without public importance because the instructions in the prior criminal case were also "unique" (Resp. Bf., p. 17), in that the jurors were told "that they need not find all of the terms charged to hold the defendants guilty" (Resp. Bf., p. 15).[2]

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1. They appear in seven separately numbered paragraphs, 16 to 22. The objects were numerous and are found in the first six of those 7 paragraphs, as specifically alleged in paragraph 22, viz.: "in order to carry out the objects set forth in paragraphs 16 to 21, inclusive." The means and methods, also being terms, were numerous and were set forth in 20 lettered subparagraphs of paragraph 22.

2. The jury was never told that it need not find all the "terms." It was told simply that it need not find that defendants did all of the "acts."

To illustrate, the jury was told "(the Government) can only complain if the defendants do sufficient of these acts charged in the indictment as to amount to duress upon the dealer to accomplish a result that would not otherwise (not) have been accomplished, and to force the dealer to do something that he would not have done of his own free will. • • • If (the defendants) did not do it, this lawsuit is at an end" (R. 8537; see, also, R. 8535, 8536, 8538, 8547, 8548, 8549, 8552). Note respondents' similar interpretation of Judge Lindley's charge when asking Judge LaBuy to instruct the jury in the instant case (R. 9018).

This contention also is without foundation. Such an instruction is a stock form, requested by the Government and used in virtually all large conspiracy cases, in line with the general rule that not all acts charged need be proven. *U. S.* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 250, 252. The same stock form was used in the criminal case involved in the *Local 167* case.[1]

(C) Merits of Petitioners' Contentions.

Indictment. Respondents cite a particular oral argument by petitioners to the trial court (Resp. Bf., p. 14) apparently as a concession somehow precluding petitioners from contending here that the indictment was properly admitted. This argument could not have been a concession having such effect, since it was made *after* the admission of the indictment and concerned a different subject matter.[2] Moreover, even if it were a concession, it would

1. The jury there was instructed as follows (This Court, Oct. Tm., 1939, No. 758, record pages 700, 710):

"* * * a mere agreement * * * constitutes an offense and it is not necessary in order to make out the offense that anything be done * * * in carrying out its objects (p. 700) * * * it is not necessary * * * that every detail of the charge * * * in the indictment should be found in order to return a verdict * * *. It is not necessary to find every last word * * * in the indictment in that respect; if you find * * * interstate commerce, * * * an unlawful agreement, and * * * an unreasonable restraint, however, it might have been brought about if one or more of the plans in the indictment actually took place (p. 710) * * *."

2. The cited remarks were expressly confined (R. 425) to the admissibility of "the entire evidence of the criminal case" (R. 422, 423) as evidence extrinsic to the common law record of "what was established" by the conviction and as proof in the instant case of those matters there established (R. 442, 443).

Counsel made the same argument as in the Petition, contending that Section 5 referred to rules "applicable to the principles of estoppel by judgment" only by way of analogy, but not that "estoppel by judgment is a rule applicable here. It is only secondarily applicable" (R. 424); further, that to apply the qualifications of that doctrine to cases under Section 5 would be "an irrational use of that principle" (R. 441).

Counsel further argued that while the court "has the responsibility * * * in the first instance" of determining the scope of the estoppel as a matter of law, "that simply begs the question" (R. 426) which was how the jury could be apprised "sufficiently of the facts, the factual issues * * * decided in the criminal case"—"so that they could exercise that function (of determining such issues) intelligently and with knowledge" (R. 427).

not prevent another theory from being advanced in support of the judgment. *Helvering* v. *Gowran*, 302 U. S. 238, 245-246.

Respondents' contention that the indictment should not have been admitted rests on the erroneous premise that there was no question of fact for the jury concerning the prior case (Resp. Bf., pp. 16-17). The truth is that there were strenuously litigated issues of fact as to whether the charges, issues, witnesses, evidence and conspiracies were the same in the two cases which *respondents themselves* posed to the jury as major questions it must decide (Petn., pp. 16-17; R. 302, 304, 7210, 7211). Thus, for them to say that the trial judge retains his functions of instructing the jury as to the conviction and its use as evidence (Resp. Bf., pp. 16-17) stops short of reaching the question of how the jury is to be given a rational basis, under Section 5, for exercising its functions in determining these issues of fact. Respondents do not face up to the fact of overriding significance, that because Section 5 makes the prior conviction merely *prima facie* evidence, the jury must decide these factual issues no less than any other (Petn., p. 17).

Instructions. 1. Respondents grievously distort the meaning of instruction 12 (Resp. Bf., p. 16). *Instruction 12 never even mentioned the indictment* (Appendix to Petn., pp. i-iii).

2. Respondents claim that *Local 167* v. *U. S.*, 291 U. S. 293, is not controlling because the principles of estoppel by judgment were not the grounds of decision in that case (Resp. Bf., p. 17, fn. 1).

This contention is refuted by the opinions in that case which show: (a) the Government's ground for the motion to strike was that the matters "had been adjudicated * * * in an earlier criminal proceeding" (44 F. (2d) at p. 393);

(b) the defense to the motion, similar to respondents' argument in the instant case, was "the Government could have established the guilt of defendants in the criminal case by proof of any one of the several overt acts alleged; therefore, the verdict did not necessarily adjudicate the commission of any specific overt acts on the part of the defendants" (44 F. (2d) at p. 394); (c) the District Court struck as sham the denials of the allegations taken from the indictment on the ground that the previous conviction was "conclusive" (44 F. (2d) at p. 394); and (d) this Court, in affirming, held that "the defendants in this suit who had been there convicted could not require proof of what had been duly adjudged between the parties" (291 U. S., at p. 298).

3. Respondents seek to meet petitioners' strong showing that the criminal judgment was admissible on elementary principles of relevancy, as evidence of respondents' conspiratorial frame of mind (Petn., p. 24)—the prime issue in the case (R. 9459)—by stating that "no instruction was given or asked to the effect that such was the purpose of the judgment" (Resp. Bf., p. 13, fn. 1).

Respondents miss the point. Their argument amounts to a concession that the judgment was admissible, although only for this purpose, and that the instruction would have been proper if only the Court had qualified it as respondents *now* suggest. But respondents never suggested to the trial court that instruction 12 be so qualified (R. 7430). Since the express ground of their objection was improper, as they would seem to concede, they are in no position to complain now of the court's failure to so qualify the instruction. Fed. Rules of Civ. Proc., Rule 51; *McVeigh* v. *McGurren* (C. A. 7), 117 F. (2d) 672, 680; *Penn. R. Co.* v. *Minds*, 250 U. S. 368, 375.

II.

Price-Fixing Purpose as a Defense.

The evasive nature of respondents' answer to this point has been discussed, *ante*, at pp. 3-6.[1]

Respondents' principal contention is that petitioners' argument should be dismissed as an afterthought. But the rule is that a theory to support a judgment may be advanced at any stage of the proceedings. *Helvering* v. *Gowran*, 302 U. S. 238, 245-246. However, respondents' assertion is inaccurate. As noted in the petition for rehearing, the precise argument was made orally to the Court of Appeals (R. 9515, sentence beginning: "But a broader question arises, etc."), as well as in the petition for rehearing (R. 9515-9517). Thus, the original opinion of that Court, and especially the modification thereof on rehearing, must be deemed a rejection of this argument.

III.

Huge Masses of Negative Testimony and Uncorroborative Evidence.

Negative Testimony. The gist of respondents' answer is to agree that the opinion below opens the door to the testimony of as many as 15,000 dealers, but to dispute that such testimony is "negative" (Resp. Bf., pp. 19-21).

Thus, the public importance of the holding is conceded, *i. e.*, that conspirators in large conspiracy cases will be enabled to introduce the testimony of thousands to say

1. Out of the substantial body of evidence cited, respondents take issue with the significance of only three record citations, R. 38, 42 and 2938. The first two refer to the very contract provisions which, as seen from the third record citation (see, also, R. 2927-2928), were interpreted by respondents as in the Petition, p. 27, providing the contractual basis for respondents' claimed right to cancel the dealer for customer dissatisfaction over higher installment prices.

they were not victims, thereby making a shambles of such trials.

To demonstrate that such testimony is not "negative," respondents merely quote and restate the non-sequitur indulged in by the court below (Resp. Bf., p. 20), thus joining issue as to a fundamental question of logic, without attempting to distinguish petitioners' authorities (Petn., p. 31).

Uncorroborative Evidence. Respondents state that the purpose of the offers was "to show that defendants' belief * * *ridiculed as a pretext—was in fact well warranted" (Resp. Bf., p. 22)—arguing in effect that the evidence which did not enter respondents' mind would have probative value to establish that their asserted frame of mind was in truth their frame of mind and not a mere pretext.

In making this argument, respondents again join issue on a fundamental question of logic (Petn., p. 32). They do not in anywise challenge petitioners' representations as to the extreme detriment which the admission of uncorroborative evidence would work in all large conspiracy cases.

Respondents attempt to distinguish *Eastman Kodak Co.* v. *Southern Photo Materials Co.*, 273 U. S. 359, 375, apparently on the ground that the holding arose on instructions rather than on a ruling on evidence—an immaterial distinction—and on the ground that the purpose of the offer here was to prove, not the frame of mind, but that the asserted frame of mind was the actual frame of mind—which, upon analysis, are seen to be one and the same.

The case of *May* v. *U. S.* (App. D. C.), 175 F. (2d) 994, 1008, 1009, which respondents also attempt to distinguish, applies the same principle of logic in holding that where

the issue is defendant's frame of mind in doing a certain act, it is immaterial to prove that the independent facts corresponded to the asserted belief. To escape the impact of that case, respondents obscure the true nature of the pertinent holding. Insofar as material, the issue there was "whether (the money) was received as compensation" (p. 1006). Respondents swallow up this issue by stating that the ground of the exclusion was that "acceptance of the compensation * * * was a crime regardless * * *" (Resp. Bf., p. 22).

IV.

Abandonment of Rudimentary Principles of Review. Failure to Review the Case in the Context of the Record.

Petitioners argued that none of the *exclusions* could have been prejudicial to the defense because of its open dishonesty and sham nature (Petn., pp. 33-38).

Respondents evade this by asserting that whether or not the exclusions were prejudicial, nevertheless, if the *admission* or use of the criminal judgment was erroneous, such error would require a reversal anyhow (Resp. Bf., p. 24).

This is an irrelevancy. Point IV states a separate ground relating to exclusions, not to the admission of the conviction dealt with in Point I.

Next, respondents say that the overwhelming evidence of the sham nature of the defense "would not be the basis for denying the substantive rights of the parties" (Resp. Bf., p. 24). This begs the question. The so-called "misconduct" was overwhelming proof that there was no substance in the defense. Manifestly, a sham defense is no defense, and it is specious to say that preventing the amplification thereof is a deprivation of substantive rights.

Acceptance of Spurious Offers of Proof at Face Value.

Here again (Resp. Bf., pp. 25-26), respondents attempt no evidentiary refutation of petitioners' demonstration that Def. Ex. 173 for ident. was patently spurious (Petn., pp. 39-40). Nor do they deny that both Exhibit 173 and the offer through Emich's one-time bookkeeper were challenged as to their good faith and were directed to a frivolous defense (Petn., pp. 40-41). That these offers were so directed is in fact reaffirmed by respondents' express disavowal that delivered prices were an issue in this case (Resp. Bf., p. 18; see *ante*, pp. 5-6).

Thus, the question is clear-cut:

Where an offer (a) is challenged as to its good faith, (b) can be demonstrated to be spurious from its face or from other evidence in the record—indeed, part and parcel of a sham defense, and (c) from the offerors' avowed purpose, is seen to be directed to a frivolous issue—is the reviewing court to presume, nevertheless, that (1) proof would be made as offered; (2) the offer is capable of establishing that for which it is offered; and (3) the exclusion thereof was necessarily prejudicial?

Respondents rely on *Scotland County* v. *Hill*, 112 U. S. 183, 186 (Resp. Bf., p. 26), without discussing the crucial language thereof which, as petitioners showed, is opposed to respondents' view (Petn., pp. 38-39).

Serious Misstatements of the Record.

Petitioners pointed out serious misstatements of the record upon which reversible error was predicated (Petn., p. 41). Upon rehearing, the Court below corrected one (R. 9551), failing to correct the others (R. 9493-9497).

One involved "some 60" service complaint letters held to have been prejudicially excluded (R. 9465-9466). Pe-

titioners showed there was no such exclusion; the letters were never produced, marked or offered, are not in the record, and thus, if they exist, their contents are unknown (Petn., p. 41). Respondents fail to meet this but say that "the witness * * * testified * * * that he had the complaint letters with him at the time of his testimony," citing R. 4602-4603, 4613-4614 (Resp. Bf., p. 26). This representation is inexcusable. Not only do the record citations fail to support it, but the witness testified directly to the contrary: "Q. * * * you brought in two letters * * * Do you have any other letters with you? * * * A. No, sir" (R. 4625).[1]

Respondents ignore the conflict of the holding below with *Palmer* v. *Hoffman*, 318 U. S. 109, 116, but cite the earlier case of *McCandless* v. *U. S.*, 298 U. S. 342, 347, which is not in point as it related to offers of testimony supplementing and dependent upon a previously rejected offer.

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1. Respondents' citation of R. 4604-4609 (Resp. Bf., p. 12) refers to the exclusion of two and only two letters offered, the substance of which were testified to (R. 4608-4610), contrary to respondents' assertions (Resp. Bf., p. 12). Thus, no prejudice resulted. *N. Y. Life Ins. Co.* v. *Pater*, (C. A. 7), 17 F. (2d) 963, 964.

R. 5068-5072 (Resp. Bf., p. 12) shows respondents were not permitted, *on redirect examination*, to interrogate as to letters not gone into on cross-examination. The impression is conveyed that two were marked and specifically offered as evidencing the contents of all 60, citing R. 5071 (Resp. Bf., p. 26). But no statement to this effect appears in the record, no others were in court, and no others were offered (*e. g.*, R. 4604, 4608, 4625). R. 5071 merely was a subsequent reference to the offers of the two letters as previously made, and in no way enlarged the offers. *The inescapable fact is the trial court never was given an opportunity to rule on any letters other than the two aforementioned, despite its promissory statement that "you (respondents) can bring in your files and I will rule on it when it comes up"* (R. 5019). Promissory "rulings" are not reviewable. *Chicago City R. Co.* v. *Carroll*, 206 Ill. 318, 328-329; *Columbia Realty Inv. Co.* v. *Alameda Land Co.*, 87 Or., 277, 290-291.

As seen, *ante*, p. 7, fn. 1, each service complaint was unique in nature, susceptible to evaluation only on the basis of its own contents. Thus, without knowing the contents of each, the reviewing court is in no position to assess prejudice, even if the exclusions were actual rather than fancied.

Failure to Take into Account That the Excluded Evidence Was Merely Cumulative.

The only answer given to petitioners' showing that the record contains a large body of evidence to the same effect as the excluded offers (mere listing required 3½ pages, Appendix to Petn., pp. ix-xii) was to characterize it as "fragmentary and emasculated" (Resp. Bf., p. 24). Respondents do not dispute that they fully argued the significance of this evidence to the jury (Petn., p. 42, fn. 1).

Failure to Separately Consider Each Exclusionary Ruling.

Respondents misinterpret petitioners' position as a contention that the reviewing court may not dispose of similar items of evidence as a "group" (Resp. Bf., p. 27).

No one could have objections to "grouping," provided the items in any given group (a) consist of similar evidence, (b) were offered for similar purposes, (c) were excluded on similar grounds, and (d) were not excludible on other grounds, even though not advanced in the trial. But such was not the case here in numerous instances, *e. g.*, "some 60" letters, Exhibit 173 and the offer through Stapleton, all previously discussed, and the offer through GMAC employee Moore.[1]

Respondents indulge in a gross misstatement when they assert "all letters from customers complaining about poor service were erroneously excluded * * * on the ground that they were hearsay" (Resp. Bf., p. 27). No less than 16 such letters are in evidence as defense exhibits.[2]

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1. The exclusion of the Moore offer was held to be an erroneous application of the hearsay rule (R. 9466, discussion of "other offers of proof by a GMAC employee"). But it was not. The stated purpose of the offer was unique, *i. e.*, to prove "the mental attitude of Mr. Emich" (R. 4425). The stated objection was that this was not an issue in the case. The trial court sustained the objection without stating its reasons (R. 4425).

2. Def. Exs. 170 (R. 8085), 311 (R. 8938), 313 (R. 8941), 330 (R. 8961), 315 (R. 8944), 307 (R. 8931), 264 (R. 8833), 301 (R. 8921), 318 (R. 8947), 310 (R. 8937), 314 (R. 8943), 306 (R. 8929), 317 (R. 8946), 322 (R. 8953), 331 (R. 8963), 328 (R. 8959).

V.

Damages.

Petitioners argue two major rulings: (1) as to the admissibility of the testimony of the President of Emich Motors as to lost sales; and (2) as to the effect of 49 Stat. 1561 (U. S. C., T. 28, old Sec. 695, new Sec. 1732) upon the admissibility of petitioners' accounting testimony.

These rulings go to the heart of a large number of damage cases, especially those involving depredations upon business. The second of these is additionally important because it has never before been passed upon except *sub silentio* by the Court below.

Concerning the first ruling, respondents suggest that the authorities cited by petitioners would not sanction the admission of estimates of a President testifying solely from his "mind" and "heart" (Resp. Bf., p. 28). This is merely an evasion, founded upon another crude perversion of the record.[1]

Respondents do not discuss the second except to reassert that the accountant's testimony was inadmissible be-

1. The words "mind" and "heart", as cited by respondents at R. 1457, were a retort during a baiting cross-examination as to Emich's recollection of lost sales during operations in 1934. The true sense of "mind" was that he remembered, and the true sense of "mind and heart" was that it was a painful memory. His testimony reveals his qualification to make estimates, *i. e.*, 17 years as an automobile dealer, 21 years in the automobile finance business, 6 years purchasing cars for the State and managing its highway garages (R. 1035, 1036, 1466-1469, 1476, 8731). In making his estimates, it is clear he had in "mind" the economic conditions in the automobile business (R. 1037, 1447, 1460, 1465, 1473), pertinent Chevrolet production figures (R. 1470-1473, 8125), the growing sales operations of the dealerships and actual sales lost through respondents' delivery discriminations (R. 1078, 1079, 1085, 1098, 1125, 1129-1135, 1447, 1450, 8399, 8403), knowledge of other dealers' sales in comparison to his own (R. 1462, 8319, 8362), including those of comparable dealers after his cancellations (R. 1414, *et seq.*, 1435 *et seq.*), the demoralization of his sales force after notice of cancellations (R. 1444, 1449), and a listing of a large number of unfilled orders (R. 8444, 1458).

Moreover, the record contains abundant corroboration. (*e. g.*, Petn. p. 43, fn. 1, and material collected in Appendix to Petn., pp. vi-vii.) Other such evidence is summarized in petitioners' main brief to the Court of Appeals, pp. 162-163 (on file with the Clerk of this Court).

cause based upon allegedly unauthenticated and unaudited books.[1]

Respondents also make representations as to various matters of insufficient public importance for treatment on certiorari. Many are unfounded. For example, the basic premise is untrue, that is, that "the amounts of the verdicts were derived entirely from opinion testimony given by Lynch * * *" (Resp. Bf., p. 28; cf. concession below that a part of the verdict was supportable on other evidence, Resp. Reply Bf. to Court below, p. 35, fn. 1, on file herein.) The record contained an abundance of evidence supporting the verdict, apart from Lynch's testimony (*e. g.*, sales and earnings of comparable dealers, *Bigelow* v. *RKO Radio Pictures*, 327 U. S. 251, 264-266).

Respectfully submitted,

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1. Respondents ignore that the books *had* been periodically audited, were shown to be in balance, and that Chevrolet had access to and exercised paid supervision over them (Petn., p. 44, including fn. 1).